

The ALJ found claimant suffered an accidental injury, arising out of and in the course of his employment, and the accidental injury was the prevailing factor causing claimant's injury, medical condition and disability. As a result, the ALJ ordered respondent to pay claimant's medical bills and medical mileage.

Respondent appeals, arguing claimant failed to sustain his burden of proof that his alleged accident on or about September 27, 2012, arose out of and in the course of his employment and was the prevailing factor in causing his cervical spine condition. Should the Board find claimant sustained his burden, respondent contends claimant failed to lay any foundation for or offer into evidence the medical bills and mileage lists that were ordered paid. Therefore, the ALJ's Order for payment of medical bills and mileage should be reversed.

Claimant argues the ALJ's Order should be affirmed. Claimant contends there is no evidence to contradict that he worked for respondent on September 27, 2012, suffering an injury to his cervical spine which arose out of and in the course of his employment. Claimant also contends the September 27, 2012, accident was the prevailing factor causing his injury, medical condition and disability. Claimant finally contends respondent had notice he was injured and chose to ignore it. Under K.S.A. 44-510h, the employer is responsible for all medical bills incurred for claimant's treatment and, since respondent failed to follow K.S.A. 44-510h(a) when it disputed the medical bills, the expenses incurred by claimant for the treatment of his injuries should be ordered paid as authorized medical expenses.

Issues on appeal are:

1. Did claimant's alleged accident arise out of and in the course of his employment with respondent?
2. Did the injuries stemming from claimant's alleged accident and the resulting need for medical treatment arise out of and in the course of claimant's employment with respondent?
3. Was claimant's alleged accident the "prevailing factor" as required by K.S.A. 44-508(f)(2)(B)(ii), in causing the injury, medical condition and need for treatment and resulting disability?
4. Did the ALJ exceed his jurisdiction in awarding payment of unauthorized medical bills and medical mileage without a single supporting medical record or report or any evidence the medical bills were reasonable and necessary to cure and relieve the effects of the alleged work-related injury in the record? What is the Board's jurisdiction over this issue?
5. Did the ALJ exceed his jurisdiction in ordering payment of unauthorized medical bills that were never offered or admitted into evidence? What is the Board's jurisdiction over this issue?

FINDINGS OF FACT

Claimant's job with respondent was as a driver/mechanic/crusher. He testified that on September 27, 2012, he was on a job in Grapevine, Texas, crushing concrete on a construction site. Claimant testified that the breaker truck being used on the job had a cracked frame and wouldn't stay in line and the suspension wasn't right. He decided to climb in between the tires and the fender well to check the frame. While he was under the breaker truck, the air dryer went out. The air dryer is what keeps the air bags inflated. Claimant testified that when the air dryer went out the fenders of the breaker truck came down on top of him. Each fender weighs more than a thousand pounds. The fender came down on claimant's neck and back as he was facing down checking the suspension. Claimant doesn't remember much after that, except for coming to, lying between the tires. He started to get up and had trouble. He was stumbling around disoriented. Claimant testified that one of the workers came over and asked if he was all right and helped him to his company pickup truck. He got into the pickup truck and drove to his motel and called his boss. Claimant reported the accident, was told not to touch anything else and that the boss was on his way.

When claimant's boss, Mark Clements, arrived at the job site he called claimant and asked him to come to the job site. Despite having pain in his back and neck, claimant drove back to the site. Claimant told Mr. Clements he thought he had a pinched nerve. While he was trying to explain what happened, Mr. Clements told him he was starting to irritate him and then drove him back to the motel. Mr. Clements took claimant's work pickup truck back to the job site. Claimant related Mr. Clements' irritation to the fact Mr. Clements was supposed to be leaving for vacation when claimant called to report this accident.

The next day claimant, contacted respondent to find out what he needed to do and to report he was still not feeling good. He was told he was fired for being unable to come to work. Claimant testified he had to take a shuttle to the job site to pick up the company pickup truck to drive home. He had no money for gas as respondent shut off his company credit card. Claimant made it as far as Wichita, Kansas before he ran out of gas. Claimant called respondent and reported running out of gas and was told to leave the truck and someone would come and get it. Claimant left the pickup truck at the turnpike on K-96 and called his wife to come pick him up. That same day claimant went by respondent's shop and picked up his paycheck. He again reported his injury and asked for medical treatment. No treatment was offered.

When claimant got home on September 28, 2012, he laid in bed. He thought that he would be able to get over the pain and did not seek medical treatment at that time. Claimant had pain in his neck and upper back near his shoulder blades. Claimant finally sought treatment when his legs started going numb. Claimant testified he remembers his wife taking him to the emergency and then waking up with a brace on his neck. Claimant

doesn't remember being flown from Newman Memorial Hospital in Emporia, Kansas to Wesley Medical Center in Wichita, Kansas, where he underwent surgery on his neck.

Claimant doesn't remember the air flight or ambulance ride to the hospital and he doesn't recall how long he was in the hospital in Wichita. He was provided rehabilitation and physical therapy in Emporia. After he left the rehabilitation facility, he and his wife moved to Olpe, Kansas and later Strong City, Kansas. Claimant did make some trips back to Emporia while living in Olpe for wound care when his incision re-opened after the stitches were taken out.

Claimant was released to return to light duty in the summer of 2013, and obtained a job with Atchison Trucking driving from Kansas to Wisconsin. Claimant held this job for three months before having a spinal cord flare-up in October 2013.

Claimant went to Morris County Hospital to be checked out for numbness and tingling in his legs and fingers. He did not report a new injury. Claimant was told the flare-up was likely from all of the driving and he was taken off work for a week. When he informed his employer, Atchison Trucking, he needed the week off, his employment was terminated. Claimant had been given anti-inflammatory and pain medication and sent to Manhattan to see a neurosurgeon. Claimant testified that the neurosurgeon believed he had another spinal cord flare-up. Claimant has pain 85 percent of the time and the rest of the time experiences irritation. Claimant described the pain as sharp and throbbing. He has a constant headache, and if he rides for long distances he gets numbness and tingling in his toes and legs.

Claimant currently works for Blasi Trucking driving from Pueblo, Colorado to Paris, Texas. This route covers 600 miles round trip. Claimant drives six days a week at \$22 an hour. Claimant has a 20 pound lifting restriction.

Claimant would like treatment for his headaches and for pain in his neck and between his shoulders. Claimant testified that his level of pain is a five during the day and a zero to one if he is lounging around, but it depends on the day. He denies any prior neck problems.

Claimant's wife, Melinda, testified that all of the bills included in Claimant's Exhibit 1, totaling \$100,034.99, were incurred to treat the accident claimant suffered on September 27, 2012. She was the one who drove claimant to Newman Memorial Hospital after claimant was unable to feel his legs and was unable to get up. Mrs. Potter verifies claimant does not remember anything about his care at the hospital or being transferred to Wesley Medical Center via airlift. Mrs. Potter testified that she was the one who provided the details of claimant's accident in Texas when they arrived at Newman Memorial Hospital. She doesn't know where the rest of the information in claimant's medical history came from. She did admit that she wasn't in his room the entire time

because she had to make arrangements for someone to take care of their kids, so claimant may have provided some information.

Mark Clements, President of Walker Construction, testified claimant worked for the company for six months breaking concrete and pavement. Claimant utilized a machine to break up the concrete and pavement, but there were also physical aspects to the job. Claimant also performed mechanic work on the vehicles. Mr. Clements testified the vehicles included pickup trucks, the concrete breakers and the trucks they are mounted on. As part of the mechanic work, claimant needed to be under vehicles every day to check oil and on occasion replace wheel bearings.

Mr. Clements testified that to his knowledge, claimant had no physical problems when he started working for the company, other than a limp, which claimant never talked about. On one occasion, claimant did mention something about being shot in the leg while in a fist fight, but he didn't specify when that happened. From the time claimant started work, until his last day, the only physical problem claimant reported was a broken thumb. Claimant made no mention of any problems with his back, neck, or head. Mr. Clements doesn't recall if claimant missed any work in his six months of employment for neck or back problems.

Mr. Clements testified the company obtained a job in Grapevine, Texas to break up concrete, and he assigned claimant to that job. Mr. Clements acknowledged the breaker truck claimant took to Texas had a three inch crack in the frame. But that was repaired before he left. Mr. Clements testified it is not common for a frame to crack and he is not sure why it cracked, but he was able to fix it. Claimant did not report anything that would have caused damage to the frame.

Mr. Clements testified that when claimant called about the cracked frame, he was on a job in Henrietta, Oklahoma and came to Olathe to check it out. Mr. Clements told claimant he would make repairs to the breaker truck and told claimant of the job in Texas. Mr. Clements took claimant's breaker back to Henrietta for repairs and claimant was to meet him there, but claimant never made it to Henrietta because he had trouble with the pickup truck he was driving and had to get it checked out first. Claimant made plans to meet with Mr. Clements in Tulsa, Oklahoma, but again they missed each other. Mr. Clements left the breaker truck for claimant in Henrietta, claimant picked up the breaker truck and proceeded to Texas. Mr. Clements testified that claimant called on his way to Texas reporting a vibration in the breaker truck and asked if it Mr. Clements had noticed it when he had it. Mr. Clements hadn't and authorized claimant to get it checked out. Mr. Clements testified there were minor things wrong with the breaker truck, like lights that didn't work, but they were things that could be fixed easily. He also testified that the breaker truck had undergone a DOT inspection and passed.

Mr. Clements testified claimant reported his accident during the conversation they had about the breaker truck and its mechanical issues. Apparently, when claimant first got to Texas he spent time working on the breaker truck.

Mr. Clements testified that when he got to Texas and checked out the truck he couldn't find anything wrong except for a bunch of wires that were cut and unplugged. He was trying to figure out what happened at the same time claimant was trying to explain. It got to the point where claimant was a distraction, so he took him to the hotel and then went back to the site. He indicated claimant was trying to tell him that the problems were in the same area where the frame had been cracked and repaired. He couldn't find anything, so he repaired the cut wires and connected the battery cable, got it started and loaded it on the trailer and took it back to the shop. Mr. Clements left the pickup truck for claimant to make his way back to Emporia.

Mr. Clements testified that when claimant reported he was injured he never mentioned anything falling on him. Mr. Clements admitted he and claimant had several conversations, so he wasn't really sure when claimant said what. Mr. Clement testified claimant only mentioned injury to his back. He said nothing about his neck.

He told me that he was under the truck looking for this break or something and the truck started by itself and when he went to scramble out from under it, as I understand, that's not his exact words, but he thought he pulled his back.¹

He also testified that while he was with claimant at the site claimant did not act like he was hurt. The only thing claimant reported was straining his back when he went to move out of the way of the breaker truck that had started on its own while he was under it. Mr. Clements testified claimant told him he thought he pulled his back. He did not ask claimant if he needed to see a doctor and claimant did not ask to see a doctor.

Mr. Clements testified claimant told him there was a problem with the truck's air bags that caused them to inflate and deflate while claimant was under the truck, pinning him. When he reached Emporia, Mr. Clements inspected the air bags and found nothing wrong. Mr. Clements testified that after putting new wiring in the breaker truck, he used it to complete a job in Olathe and then took it back to Texas to complete that job.

Mr. Clements testified that when he got to Texas he could tell claimant had only spent 30 minutes breaking concrete. Mr. Clements was in Texas because claimant called and reported the motor and transmission were falling out of the breaker truck and the frame was bowed to the ground.

¹ Clements Depo. at 39-40.

Mr. Clements terminated claimant's employment on his way back from Texas. He testified he called claimant and told him he was fired and that the pickup truck was filled with gas so that he could make it home because the credit card issued to him had been cancelled. Mr. Clements fired claimant because he didn't do any of the work that week he was supposed to do. But mainly claimant was fired because he didn't get any concrete broke while he was in Texas. Had there been something truly wrong with the breaker truck the lack of work would not have been an issue. He determined this because he had a master mechanic check it out.

After claimant was fired, Mr. Clements had no contact with claimant until he called to let Mr. Clements know the pickup truck ran out of gas and claimant had no money to fill it. Mr. Clements testified he told claimant he was unable to come and get him and asked if claimant had someone who could come pick him up. Claimant said his wife was coming and Mr. Clements told claimant to leave the pickup truck on the side of the road on the turnpike in Wichita. Mr. Clements picked up the pickup truck the next day. Claimant brought him the keys when he came in to pick up his final paycheck. Mr. Clements testified the only thing claimant said when he brought the keys and picked up his check was, to watch the breaker truck because it's going to bow and bend again. Mr. Clements responded that he would keep an eye on it. According to Mr. Clements, claimant still did not mention his back or neck hurting. That was the last he heard from or saw claimant until the day of his deposition.

When Mr. Clements found out claimant was filing a workers compensation claim he immediately began to investigate the situation. The first thing he did was contact the Super 8 claimant was staying at while on the job and talked to the girls at the front desk. Mr. Clements testified the girls told his wife that claimant called a shuttle to take him to the work site to pick up the truck left for him. As claimant made his way to the shuttle, they noticed he walked like he was hurt.

Mr. Clements heard from claimant's wife the day claimant was airlifted to Wichita. He couldn't recall what was actually said. Mr. Clements testified that an attempt was made to get an address from claimant to send him workers compensation paperwork, but he did not receive a response. The next thing he knew, he was informed everything needed to go through claimant's attorney as he had filed a workers compensation claim.

Mr. Clements didn't authorize medical treatment for claimant because he wasn't sure he believed him. Part of his reasoning was because Charles, the other worker for the company, told him that claimant had said it would be easy to file a workers compensation claim. Mr. Clements was not sure of the form or context of the conversation. Mr. Clements testified Charles told him that claimant indicated some of his old injuries were from his bull riding days. Mr. Clements testified before the accident he really had no problem with claimant. But, he was debating on whether he was going to keep him as an employee.

At the preliminary hearing Claimant's Exhibits No. 1 & 2 were marked, but not offered or admitted into evidence. These exhibits consist of numerous bills associated with claimant's treatments for this accident and mileage claims connected with claimant's travels to and from the various treatments being provided. Supporting medical records dealing with claimant's treatments were neither marked, offered nor admitted into evidence. The ALJ ordered payment of claimant's medical bills and medical mileage, pursuant to Claimant's Exhibits No. 1 & 2.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2012 Supp. 44-501b(a)(b)(c) states:

- (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
- (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
- (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2012 Supp. 44-508(d) states:

- (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2012 Supp. 44-508(f)(1)(2) states:

- (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
- (2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

Claimant has satisfied his burden of proving he suffered injury by accident on September 30, 2012, while working for respondent in Grapevine, Texas. Claimant's description of the accident is uncontradicted as there were no witnesses to the accident. Uncontradicted evidence, which is not improbable or unreasonable, may not be disregarded unless it is shown to be untrustworthy.²

Mr. Clements, claimant's boss, acknowledges claimant described an incident wherein claimant was allegedly injured while working on a company vehicle. Mr. Clements' only contention was that claimant supposedly identified the injury site as his back rather than his neck. The fact claimant was, in some way, injured is not seriously contradicted by Mr. Clements' testimony.

K.S.A. 2012 Supp. 44-508(f)(2)(B)(i)(ii) states:

(B) An injury by accident shall be deemed to arise out of employment only if:
(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2012 Supp. 44-508(g) states:

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

Claimant's testimony, along with the testimony of his wife, supports a connection between the accident in Texas and the resulting medical treatment. The record supports a finding claimant's accident was the prevailing factor leading to the surgery performed on claimant's neck and his current need for ongoing treatment. This record does not identify any other cause for claimant's injuries and resulting medical treatment. The ALJ specifically noted claimant was a credible witness in this matter. This Board Member finds nothing in this record of sufficient weight to discredit that observation.

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to issues where it is alleged the administrative law judge exceeded his or her jurisdiction and the following issues which are deemed jurisdictional:

1. Whether the employee suffered an accident, repetitive trauma or resulting injury;

² *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

2. Whether the injury arose out of and in the course of the employee's employment;
3. Whether notice is given;
4. Whether certain defenses apply.³

K.S.A. 2012 Supp. 44-551(i)(2)(A) states:

(2)(A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

The remaining disputed issues deal with the order by the ALJ requiring the payment of medical bills and medical mileage for claimant's ongoing treatment from the September 30, 2012 accident. Issues dealing with medical treatment and mileage are issues over which an ALJ has jurisdiction at a preliminary hearing.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.⁴

The Board does not take jurisdiction over the remaining issues raised by respondent dealing with claimant's medical bills and medical mileage claims. The ALJ did not exceed his jurisdiction in ordering payment of same at this time.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁵ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

³ K.S.A. 2012 Supp. 44-534a(a)(2).

⁴ *Allen v. Craig*, 1 Kan. App. 2d 301, 564 P.2d 552, rev. denied 221 Kan. 757 (1977); *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

⁵ K.S.A. 2013 Supp. 44-534a.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has proven that he suffered personal injury by accident which arose out of and in the course of his employment, and that accident is the prevailing factor leading to the necessary medical treatment provided claimant. The issues dealing with the order for payment of medical bills and medical mileage are not issues the Board takes jurisdiction over at this stage of the proceedings.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order for Medical Treatment of Administrative Law Judge Brad E. Avery dated February 12, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May, 2014.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Brad E. Avery, Administrative Law Judge